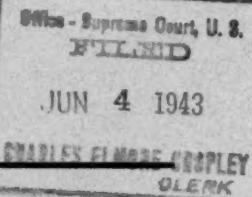


(26)
No. 1057 82



Supreme Court of the United States.

OCTOBER TERM, 1942.

HOWARD B. PARKER,
Petitioner,

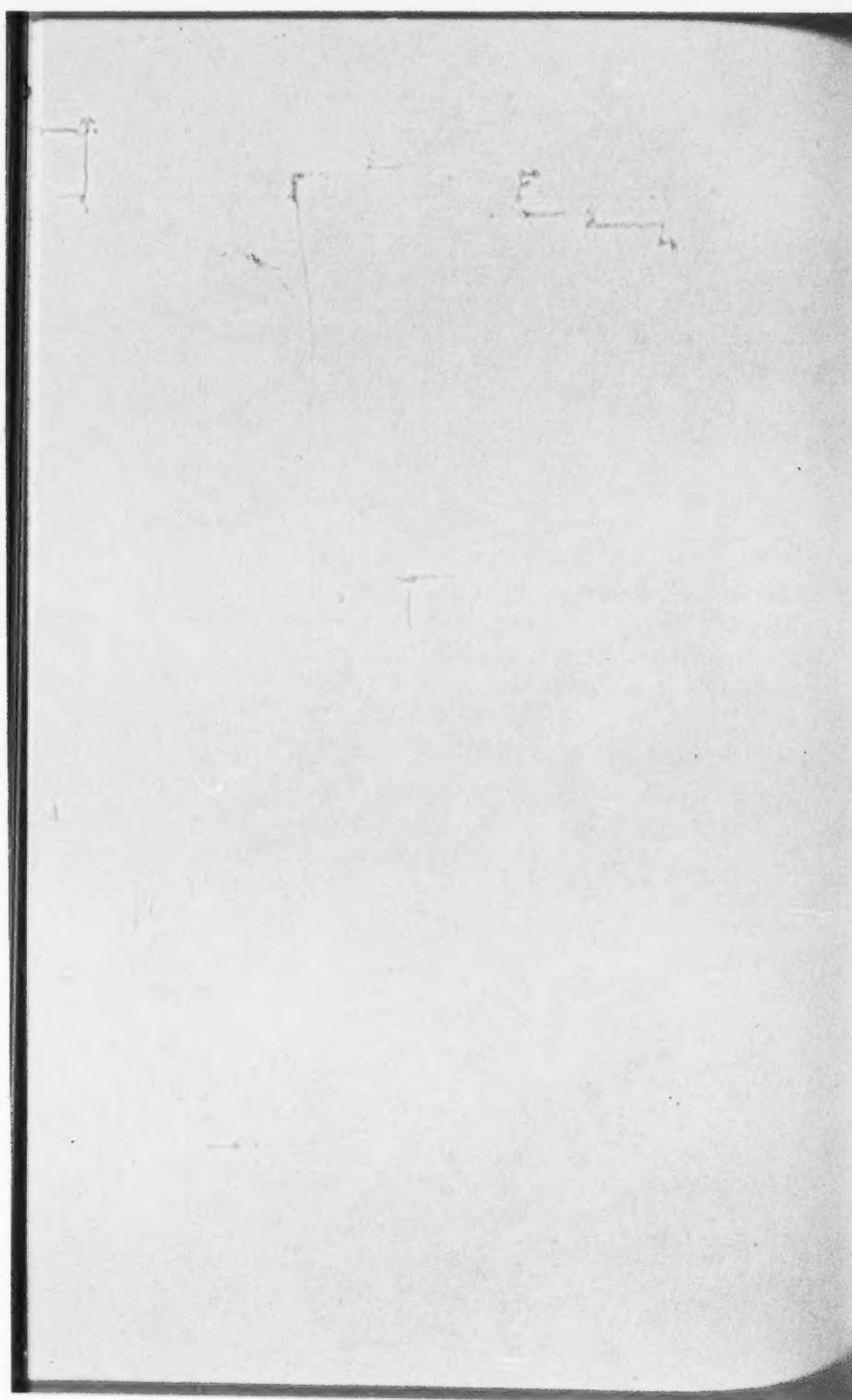
v.

UNITED STATES OF AMERICA ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
FIRST CIRCUIT
AND
BRIEF IN SUPPORT THEREOF.

RICHARD WAIT,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.



INDEX.

	Page
Petition	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	3
Specification of errors	7
Reasons for granting the writ	8
Brief	12
The decision of the Circuit Court of Appeals was wrong	12
An important Federal question is presented	14
The lower courts have confused the important dis- tinctions between civil and criminal contempt	19
There have been such departures from ordinary procedure as to merit revision by this Court	21

TABLE OF AUTHORITIES CITED.

American Trust Co. v. Wallis, 126 Fed. 464	19
Berry v. Midtown Service Corp., 104 F. (2d) 107	19
Federal Trade Commission v. Fairy Foot Products Company, 94 F. (2d) 844	15
Gompers v. Bucks Stove & Range Co., 221 U.S. 418	13, 19, 21
National Labor Relations Board v. Whittier Mills Co., 123 F. (2d) 725	21
Nat'l Popsicle Corp. v. Kroll, 104 F. (2d) 259	13
Nevitt, In re, 117 Fed. 448	13
Nye v. United States, 313 U.S. 33	21
Sixth & Wisconsin Tower, In re, 108 F. (2d) 538	19
Terminal Railway Assoc. v. United States, 266 U.S. 17	19

	Page
Communications Act of 1934, Title 47, Sec. 401(b)	15
Federal Commission Act, U.S. Code, Title 15, Secs.	
41 et seq.	15
Federal Power Act, Title 16, Sec. 825m	15
U.S. Code, Title 7, Sec. 608(a)(6)	14
U.S. Code, Title 15, Sec. 79r(f)	15
U.S. Code, Title 15, Sec. 77t(b)	15
U.S. Code, Title 15, Sec. 77u(e)	15
U.S. Code, Title 15, Secs. 80a-35 and 41	15
U.S. Code, Title 28, Sec. 227	16
U.S. Code, Title 29, Secs. 101 et seq.	16
U.S. Code, Title 29, Sec. 160(e)	15
U.S. Code, Title 29, Sec. 217	15

Supreme Court of the United States.

OCTOBER TERM, 1942.

HOWARD B. PARKER,
Petitioner,

v.

UNITED STATES OF AMERICA ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honourable the Justices of the Supreme Court of the United States, the undersigned on behalf of the above-named petitioner prays that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered April 13, 1943, in the case between the above-named parties, docketed therein as number 3790.

Opinions Below.

A memorandum opinion was filed in the District Court by Sweeney, J., and appears at page 250 of the record. The opinion of the Circuit Court of Appeals appears at pages 259 to 271 of the record.

An opinion of the Circuit Court of Appeals on an earlier appeal in the same case, referred to in the current opinion, is reported at 126 F. (2d) 370.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered April 13, 1943 (R. 271). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended, U.S. Code, Title 28, Section 347.

The case to which the petition relates is a petition for attachment for contempt filed in a bill in equity prosecuted pursuant to the provisions of U.S. Code, Title 7, Section 608(a)(6). The bill in equity was brought to enforce compliance with Order No. 4, so called, issued by the Secretary of Agriculture, regulating the handling of milk in the Boston area. The petition for attachment for contempt was filed in said bill in equity against the petitioner after the entry of a final decree and sought relief against him of a civil nature upon the theory that he had violated the terms of the final decree.

Questions Presented.

(1) A corporation owes in excess of \$40,000, and with interest in excess of \$42,236.74, under a money decree. One of its officers causes it to sell its entire product over the period during which the obligation accrued at less than its fair value, the deficit being disputed but not exceeding \$26,973.30. For the same period the excess of cost (including the \$40,000 obligation) over income from sales is \$42,236.74. On proceedings for contempt against the officer a compensatory fine is imposed upon him in the amount of \$42,236.74. As a matter of law, can so much of the fine

as exceeds the deficit in fair value of the product sold be supported?

(2) Upon a bill in equity instituted against a corporation to enforce compliance by it to an administrative order an interlocutory decree is entered commanding the corporation and its officers to comply *pendente lite*. The corporation defends the suit in good faith. Compliance requires the making of periodic money payments. The operations of the corporation will not produce sufficient money to permit the making of the payments. Must the officers thereupon cause the corporation to cease operations before conclusion of the litigation upon pain of being subjected to a fine for contempt measured by the amount owed but not paid due to inability to obtain the necessary money from operations?

(3) In assessing a compensatory fine payable to the plaintiff upon a defendant to a petition for attachment for contempt of a court decree, can the wilfulness of the defendant's contumacious acts or his intent in committing them be taken into account to enhance the fine?

Statement.

Order No. 4 became effective August 1, 1937. At that time Green Valley Creamery, Inc., a Massachusetts corporation (hereinafter referred to as "Green Valley"), was a handler of milk within the definition of and subject to Order No. 4. It continued in business as a handler until March, 1940 (R. 17). Throughout that period the petitioner was the owner of all of the capital stock of Green Valley and directed and dominated its business (R. 22). That business consisted of the purchase of milk in Vermont, the running of a creamery at Passumpsic, Vermont, and the sale of the milk at Passumpsic to Stuart Milk Com-

pany, another Massachusetts corporation (hereinafter referred to as "Stuart").

Having purchased the milk at Passumpsic from Green Valley, Stuart then caused it to be brought to Boston and sold it within the Greater Boston Marketing Area, as defined in Order No. 4. This course of business by both corporations had been carried on prior to August 1, 1937, and continued unchanged until Green Valley went out of business (R. 29). Stuart still continues business in the Boston area. The petitioner was the owner at all material times of two-fifths of the capital stock of Stuart. He was the active executive of the company and dominated its business and policies (R. 22).

The bill in equity was commenced October 1, 1937. Green Valley was made the sole party defendant. The relief sought was compliance by Green Valley with the provisions of Order No. 4 primarily through the payment of moneys to the Milk Market Administrator pursuant to Articles VIII, IX, and X of Order No. 4 (R. 3695, 2-11).^{*} An interlocutory decree directing compliance by Green Valley and its officers and payment of sums due under the order was entered by the District Court under date of November 30, 1937 (R. 2, 3). Under date of March 15, 1939, a final decree was entered containing similar commands (R. 3695, 15). This final decree was affirmed by the Circuit Court of Appeals on December 15, 1939.

Meanwhile Green Valley had made none of the payments required to be made by it under Order No. 4 and the two decrees (R. 21). Consequently the petition for attachment for contempt was filed December 19, 1939, immediately following the conclusion of the litigation in the

*The printed record in the earlier appeal, which bore the Circuit Court of Appeals number 3695, is incorporated by reference in the present record. References herein to this document are designated "R. 3695."

Circuit Court of Appeals (R. 3695, 16-21). This petition was one for civil contempt. It was filed in the suit in equity and named Green Valley (the sole defendant in that suit), the present petitioner, and his brother, who was a director of Green Valley and Stuart, as respondents. It alleged violation of the final decree only (no mention was made of the interlocutory decree) and prayed as relief commitment of the present petitioner to jail until Green Valley should obey the decree.

Green Valley wound up its business in the ensuing three months and ceased operations with no assets worthy of mention. It never had had sufficient cash or other assets with which to pay the Market Administrator and its operating expenses. When it ceased operations it owed the Market Administrator \$41,722.37 (R. 18-21), of which \$3,452.90 (R. 3695, 41) had accrued prior to the entry of the interlocutory decree. None of its assets had found their way into petitioner's pocket (R. 30). All moneys which it had received had been expended in normal operating expenses. Disregarding the obligations to the Market Administrator, its net loss was \$6.31 for 1938 and \$7,613.04 for 1939 (R. 94).

All money received by it had come from Stuart as payment for the milk delivered to it. The price thus paid and received was fixed by the petitioner as the responsible officer of each corporation (R. 150). The aggregate price paid by Stuart was \$149,675.76. The fair market value in Boston of the milk for which this money was paid was \$176,649.06 (R. 31). The milk was sold by Green Valley at Passumpsic and Stuart paid the cost of transporting it to Boston, which amounted to \$26,577.87 (R. 101).*

*The foregoing figures represent the total shown in the master's report for the period from August 1, 1937, to December 31, 1939, and include both Class I and Class II milk. Adjustments can be made to eliminate everything referable from the period prior to the

On its side of the picture Stuart had operated at a small net loss throughout. In 1938 this loss had been \$98.30; in 1939 \$1,564.52. The petitioner had received a salary from Stuart, the amount of which did not appear, but total salaries paid by Stuart were \$3,600 in 1938 and \$4,400 in 1939 (R. 95). Likewise he was voted a bonus of \$10,000 by Stuart on June 29, 1939, but this was not paid. Beyond this salary the petitioner received nothing from the operations of either corporation.

On the basis of these facts the District Judge in January, 1941, adjudged the petitioner to be in contempt and ordered him committed to jail until such time as Green Valley should pay what it owed to the Market Administrator (R. 3695, 49). Shortly thereafter and pending appeal Green Valley became a voluntary bankrupt. On appeal the Circuit Court of Appeals vacated this judgment. But the mandate directed that the District Court impose a remedial fine upon the petitioner for contempt, not only of the final decree, but also of the interlocutory decree as well (R. 267). At no time had the respondents asked any relief for violation of the interlocutory decree. That was brought into the case by the Circuit Court of Appeals of its own motion, without suggestion from either party, without argument addressed to the point, and upon a record built without reference to it by either side.

The mandate directed that the fine be measured by—

“the extent that Parker’s contumacious acts have had the intended effect of causing loss to the market administrator by depriving him irretrievably of the

temporary injunction and to eliminate Class II milk. These adjustments would vary the ultimate result by not more than \$5,000 and there is dispute as to how they should be made. The principle involved is not affected, so the above figures are given without adjustment as fairly representative of the principle for present purposes.

fruits of the decrees against Green Valley" (R. 266, 267).

On remand the respondents asked the District Court to impose a fine of \$42,236.74, which represented the deficit from the operations of Green Valley after the interlocutory decree, including the debt to the Market Administrator, but after allowance of a small credit which is presently immaterial. The petitioner contended that the measure was the deficit in fair value of the milk sold which Green Valley did not receive as a consequence of the prices which he had fixed. This would have resulted in a very much smaller fine. The District Judge in his memorandum of decision said:

"To accept such a basis for the levy of a remedial fine would not do justice to the cunning and persistency of Parker . . . The result of his conduct has meant a loss to the market administrator of \$42,236.74. This is the fair measure of his cupidity" (R. 250).

The petitioner appealed. The Circuit Court of Appeals affirmed the order. The petitioner now seeks relief in this Court.

At no stage of the proceedings has any claim for relief by way of criminal contempt been advanced by the respondents. The case is one solely of civil contempt.

Specification of Errors.

The Circuit Court of Appeals erred—

- (1) In imposing as a compensatory fine one measured in large part by punitive considerations.
- (2) In imposing a fine greater than the amount of recovery lost to the Market Administrator through the

contumacious act of the petitioner in fixing prices beneath fair value.

(3) In construing the command of the interlocutory decree to require the petitioner to stop the business of Green Valley Creamery Inc., if that business could not produce sufficient moneys to enable payment of sums ordered paid by that decree.

(4) In imposing a fine in excess of the amount which the petitioner prevented Green Valley Creamery Inc. from receiving in return for its product which but for his contumacious acts would have been available for discharge of its obligations to the Market Administrator.

(5) In affirming the order of the District Court imposing upon the petitioner a fine in the sum of \$42,236.74.

Reasons for Granting the Writ.

(1) The case presents an important point in federal law and practice. The structure of many of the recent statutes establishing administrative agencies to regulate the economic life of the nation involves the contempt power of the federal courts sitting in equity as the sanction for their ultimate enforcement. The provisions of the Agricultural Adjustment Act under which this case has been prosecuted are representative of the current social legislation generally. The proper measure of compensatory fines imposed in the application of that sanction is a matter of important public concern. The proper construction of interlocutory injunctions commanding compliance *pendente lite* and the question of whether they are to be so construed and enforced as to conclude the litigation in their practical effect is of particular importance. The interests of large numbers of persons operating small corporations with a narrow margin of profit will be served by an opinion of the Court upon this point. Uniformity of practice through-

out the country in the administration of judicial decrees for enforcement of social legislation is highly desirable. It can be achieved only through decisions of this Court and the present case presents a proper record for such a decision.

(2) The boundaries between civil and criminal contempt have been vague in the past and failure to observe them has caused confusion and injustice. Those boundaries and the consequent legal distinctions were settled by this Court in *Gompers v. Bucks Store & Range Co.*, 221 U.S. 418. In the present case both the District Court and the Circuit Court of Appeals applied the criteria properly applicable only in criminal contempt to a case of civil contempt. The supposed purpose and intent of the petitioner in committing the acts found to be contumacious was made the ground for imposing a fine of the size the petitioner has been ordered to pay. There is no authority justifying this and it is contrary to established law in cases of civil contempt as set forth in the opinions of this Court, notably in the *Gompers* case. The decision of the Circuit Court of Appeals in this respect conflicts with that of the court for the Fifth Circuit in *National Labor Relations Board v. Whittier Mills Co.*, 123 F. (2d) 725. Unless this Court reasserts the reasoning of its earlier decisions and resolves the conflict between the Circuits, confusion is sure to follow the opinion of the Circuit Court of Appeals. This Court has recently clarified the law with reference to criminal contempt. Similar clarification of the law with reference to civil contempt will serve a genuine public purpose.

(3) An injustice has been done to the petitioner, and if the writ is refused a precedent will be established for conduct by the United States as a litigant which will result in further injustices and will do injury to the public respect for the administration of justice. The record before the master consisted almost entirely of complicated computa-

tions and formal documents. These were sufficient to show the pricing policy of the corporation, its adverse effect upon the respondents, and the petitioner's responsibility for the policy. The evidence did not show more. In his report the master's findings of material facts are interlarded with repeated statements derogatory of the petitioner's motives in doing the acts found—none of which acts were disputed. These statements were immaterial as matter of law and without foundation in the evidence. The District Court confirmed the report and entered an order of commitment wholly without precedent. This order was reversed by the Circuit Court of Appeals on the first appeal, but in its opinion that court laid great emphasis upon the supposed intent and purpose of the petitioner based upon the derogatory statements in the master's report and directed the imposition of a remedial fine in lieu of the commitment. No request had been made by the respondents for such relief and the point had not been argued. Further, the Circuit Court of its own motion directed that violation of the interlocutory decree be declared. That decree was not mentioned in the petition for attachment and no argument had been had with reference to it. On remand the District Court rejected the petitioner's contentions as to the size of the fine upon the ground that petitioner's behaviour had been so reprehensible that justice required the larger fine. On the second appeal the Circuit Court affirmed upon the same ground and emphasized the *purpose* which it concluded had moved the petitioner to do what he did as a proper item to be taken into account in fixing the fine. Neither master, District Court, nor Circuit Court of Appeals found any diversion of assets to the petitioner or personal profit at the expense of the respondents. The amount which the petitioner prevented his company from receiving and so made unavailable to the respondents could not on any theory exceed \$26,973.30.

He is now faced with a liability of \$42,236.74 in the form of a *remedial* fine because the court concluded (without adequate evidence) that he had been an evil man. This manifestly unjust result has been accomplished by repeated departures from the orderly judicial procedure which this Court is sedulous to maintain in the lower federal courts.

Wherefore it is respectfully submitted that the petition should be granted.

RICHARD WAIT,
Attorney for Petitioner.

Dated, Boston, Massachusetts,
May 28, 1943.